U.S. Department of Labor

Office of Administrative Law Judges
50 Fremont Street - Suite 2100
San Francisco, CA 94105

(415) 744-6577
(415) 744-6569 (FAX)

Issue Date: 08 June 2005

OALJ CASE NUMBER: 2005-TLC-00011

ETA CASE NUMBER: R6-05108-25303

In the Matter of:

GLOBAL HORIZONS, INC.
Complainant

and

U.S. DEPARTMENT OF LABOR,
Respondent

DECISION AND ORDER

This case arises under the temporary alien agricultural labor or services provisions of the Immigration and Nationality Act, 8 U.S.C § 1101 (a) (15) (H) (ii) (a) and its implementing regulations found at 20 C.F.R 655 Part B. Global Horizons, Inc. ("Employer") has filed an appeal pursuant to 8 U.S.C § 1181 (e) (1) and 20 C.F.R § 655.104 (c) (3) and 655.112 (b) from the Region 6 certifying officer for the Employment and Training Administration ("ETA") of the U.S Department of Labor ("DOL") ("CO's") refusal to accept for consideration an application requesting temporary alien agricultural labor certification. For the reasons that follow, the CO's determination in this case is hereby **AFFIRMED**.

STATEMENT OF THE CASE

Procedural History

On April 12, 2005, Employer acting on behalf of Valley Fruit Orchard and Green Acre Farm in Washington State submitted an application ("H-2A Application") seeking 250 temporary alien agricultural fruit workers from March 8, 2005 to November 1, 2005. ALJX 4 at Exhibit 1.

On April 20, 2005, the CO denied it for consideration and sent a letter highlighting seven deficiencies ("CO's April 20 Modification Request"). EX 1.

On April 25, 2005, Employer submitted a response letter addressing the seven deficiencies and the corresponding modification requests by the CO. EX 3.

On April 29, 2005, Employer received another letter refusing to accept the H-2A Application for consideration based on three deficiencies ("CO's April 29 Modification Request"). EX 1 at 3-4. The other four deficiencies were resolved between Employer and the CO.

On May 9, 2005, Employer filed a request for a hearing *de novo* to the Office of Administrative Judges ("OALJ") pursuant to the CO's denial for consideration of its H-2A Application on the same day. Included with the Request for a De Novo Hearing was a copy of Employer's subject H-2A Application dated April 12, 2005 and subsequent correspondence between the CO and Employer regarding deficiencies to the H-2A Application and Employer's response before requesting a trial de novo. ALJX 4.

On May 17, 2005, the parties agreed by a written letter to waive their respective rights to a hearing *de novo,* to waive the accelerated time constraints for briefing and issuing a decision under the temporary labor certification regulations, and obtain an adjudication based on the written record. EX 2.

On May 18, I issued an Order setting the following briefing schedule to supplement the record: the Employer's Closing Memorandum of Points and Authorities and supporting documentation to be filed and served on or before May 23, 2005, Respondent's Response Memorandum of Points and Authorities and supporting documentation to be filed and served on or before May 27, 2005, and Employer's Reply Brief, if any, to be filed and served on or before June 1, 2005.

On May 23, 2005, Employer filed its Closing Memorandum of Points and Authorities and it is marked as an administrative law judge exhibit ("ALJX") 1, with attached exhibits 1-5 ("EX 1-5").

On May 27, 2005, Respondent sent a fax transmittal of its Response Memorandum of Points and Authorities (marked "ALJX 2") with an attached copy of an H-2A Application dated January 20, 2005 filed for 90 aliens by Employer ("RX A") and an H-2A Application dated April 27, 2005 filed for 75 aliens by Employer ("RX B").

On June 1, 2005, Employer filed its Reply Brief ("ALJX 3") containing seven exhibits. These seven exhibits submitted by Employer with ALJX 3 are rejected and not admitted into the record as my Order dated May 18, 2005 requires that any supporting documentation be filed with ALJX 1 and ALJX 2. Moreover, these documents post-date the CO's April 29, 2005 refusal to accept the H-2A Application. This is an appellate process and the record of evidence for review other than argument closes with the challenged decision by the CO. See 20 C.F.R. § 655.112(a). In this case, the closing date was April 29, 2005. As a result, the additional exhibits shall not be admitted with ALJX 3. Employer's exhibits EX 1-5, Respondents exhibits RX A-B, and ALJXs 1-4 are hereby admitted into evidence with no objections from the parties.

The remaining issues to be adjudicated before me are based on Deficiency #1 and Deficiency #2 as noted by the CO's April 29 Modification Request. *See* EX 1, Attached Checklist for Unacceptable Applications. The parties have reached an agreement as to Deficiency #3. *See* ALJX 1 at 2, n.3.

Factual Background

Deficiency #1

Employer has eight housing units intended to house its workers which are at issue in this case. Out of the eight housing units, four are owned by United Builders Property Management, ("UBPM") 2 units are owned by Employer, 1 unit is owned by Valley Fruit Orchards, and 1 unit is owned by Quail Ridge Apartments. The eight housing units are listed below:

United Builders Property Management

1) Mead Manor Apartments at 10th Avenue
2) 313 North 6th Avenue
3) Canyon Park Apartments
4) Metaline West Apartments

Global Horizon's Property

5) 1671 Houghton Road
6) 381 Buena Vista Loop Road

Valley Fruit Orchard's Property

7) 9368 Road "G" Housing Unit

Quail Ridge Apartment

8) 1500 West Mead Avenue

See ALJX 1 at 3-4.

The CO's April 29 Modification Request states the following for Deficiency #1:

1) You provide two letters of intent from Darrell Kok, Director or United Builders Property Management confirming your agreement with the different apartment complexes that you intend to use. However, you do not provide any documentation from the apartment managers, etc., that the United Builders Property Management is authorized to make a commitment on their behalf. In addition, the combined capacity of the apartment complexes in the letter provided by the management company does not match the capacity in the chart provided. You do not provide any agreement.,etc for the Quail Ridge Apartments, the units at 1671 Houghton Road, Zillah, 381 Buena Loop Road, Zillah, WA, and 9386 "G" Royal City.

2) You state that "Workers will be assigned accommodations by the employer. Workers specific housing assignments may be changed during the season." This statement is not specific to the housing that has been inspected and approved by the state.

Modification Required:

1) A written housing agreement, a signed lease, and/or the reservations made must be provided for each complex that you intend to use to house workers.

2) You must amend the application to state that housing assignments will only be changed within the housing already certified by the state for (Valley Fruit and Green Acre Farm). You are reminded that any location changes to housing made after certification must be cleared by the state and approved by the Certifying Officer.

See EX 1 at 3-4, Checklist for Unacceptable Applications

In response to the modification requests by the CO, Employer has submitted two letters of intent from UBPM. The first letter of intent is dated March 25, 2005 and shows occupancy for 174 workers. The second letter of intent is dated April 25, 2005 and shows occupancy for 159 workers. *See* EX 4. Employer has also submitted a Washington State Department of Health Temporary Housing License for its unit owned by Quail Ridge Apartments which shows occupancy for 76 workers. A letter of intent from Quail Ridge Apartments dated April 27, 2005 confirms a contract for 24 workers. *See* EX. 5. Employer has not submitted any documentation

for two units that it owns, or for the one unit owned by Valley Fruit Orchards at the time of its appeal.

Deficiency #2

The CO's second deficiency in Employer's H-2A Application is explained below:

> 1) Your application is for the purpose of providing workers for two fixed growers: Valley Fruit Orchards LLC & Green Acre Farms. In a letter dated April 12, 2005, you state that you have enclosed a letter of intent from both growers and further on state that "this application replaces and perfects the application for which you recently denied certification." The Letter of Intent dated January 4, 2005 from John Verbrugge, the owner of Valley Fruit Orchards LLC to Mr. Mordechai Orian, the President of Global Horizons, Inc., states "this is to confirm that Valley Fruit Orhcards LLC has contracted with Global Horizons, Inc. to provide up to "90 workers for "pruning, training, thinking, tree planting, and harvest" on "Valley Fruit Orchards" from March 1 2005 to November 1, 2005. However, in your modification response letter written on April 25, 205, you state "This application is for additional workers to perform the listed tasks at Valley Fruit and Green Acres Farms. This application is in addition to the 90 workers for Valley Fruit for the starting date of employment of March 8, 2005 which you recently denied and which is currently under appeal."

See EX 1, Checklist for Unacceptable Applications.

The CO states further that:

> Your inconsistencies concerning the actual number of workers needed and Employer's failure to provide a new letter of intent from John Verbugge… appears that you [Employer] has met its contractual obligation to Valley Fruit for the time period of March 1, 2005 to November 1, 2005 meaning that they do not have a need for additional H-2A workers. If you are unable to justify the additional need for Valley Fruit Orchards, LLC, you must eliminate them from this application and adjust your number of workers requested accordingly." *Id.*

Employer has taken the position that this H-2A Application requests an additional 90 workers for Valley Fruit Orchards and Green Acre Farm from its previous application for just Valley Fruit Orchards which had also requested 90 workers. *See* ALJX 3 at 2. Respondent has taken the

position that this H-2A Application for 250 workers is seeking to replace the previous H-2A Application seeking 90 workers, which was denied by the CO on April 12, 2005.[1]

The Regulations

The H-2A program is governed by 8 U.S.C § 1101 (a) (15) (H) (ii) (a) and 20 C.F.R § 655.90. *et. seq.* and allows an employer to hire temporary alien agricultural workers if the DOL determines that there are insufficient qualified, eligible U.S workers who will be available at the time and place needed to perform the work, and that the wages and other terms and conditions under which the alien workers will be employed will not adversely affect U.S workers similarly situated. The application must contain a copy of the job offer describing the terms and conditions of employment and be submitted to the ETA where it is reviewed by the region's CO. If the CO determines that there are deficiencies which render the application "not acceptable for consideration," the employer must be given the opportunity to submit an amended application within five days. 20 C.F.R § 655.101(c)(2). An employer also has the right to request a *de novo* hearing before an administrative law judge regarding a decision by the CO to not accept an application for consideration. 20 C.F.R §655.112 (b)(1). The decision by the administrative law judge shall then be the final decision of the Secretary, and no further review shall be given to the temporary alien agricultural labor certification application. 20 C.F.R §655.112 (b)(2).

One of the requirements set forth under these regulations is that employers provide free housing to those workers who are not reasonably able to return to their residence within the same

[1] The application for 90 workers for Valley Fruit Orchards was assigned case number 2005-TLC-00009 and a decision was granted by me on June 1, 2005 reversing the CO's denial of 29 H-2A certifications. On appeal, Employer was only seeking H-2A certifications for 29 out of the 90 workers requested on its application. Employer presented an argument in 2005-TLC-00009 that their application for the 90 workers was meant to "replace and perfect" a prior H-2A Application for Green Acre Farm and Zirkle Farm which they had submitted on November 24, 2004 and was denied certification on January 3, 2005.

day, without charge to the worker. 20 C.F.R § 655.102 (b)(1). Employer-provided housing shall meet the full set of DOL Occupational Safety and Health Administration ("OSHA") standards. 20 C.F.R § 655 (b) (1) (i). As for rental, public accommodation or other substantially similar class of habitation, it must meet local standards for such housing. In the absence of applicable local standards, State standards shall apply. In the absence of applicable local or State standards, OSHA standards at 29 C.F.R 1910.42[2] shall apply. 20 C.F.R § 655 (b) (1) (iii). The employer must also pay any charges for rental housing to the owner or operator of the housing, and when such housing is supplied by an employer, the employer shall document to the satisfaction of the RA[3] that the housing complies with the local, State or federal housing standards applicable under this paragraph (b) (1) (iii). *Id.*.

Discussion

Employer Has Not Met Its Burden of Proof to Show That It Has Satisfied the CO's Requirements to Provide Adequate Housing Documentation

The burden of proof in the labor certification process is on the Employer. *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997); *Marsh Edelman*, 1994-INA-537 (Mar. 1, 1996); 20 C.F.R. 656.2(b). As was noted by the Board of Alien Labor Certification Appeals (Board) in *Carlos Uy III*, 1997-INA-304 (Mar 3, 1999)(*en banc),* "[u]nder the regulatory scheme of 20 C.F.R. Part 24, rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued." *Id.* at 8. The Employer has the burden of satisfactorily responding to or rebutting all findings in the NOF. *Belha Corp.,* 1988-INA-24 (May 5, 1989) (*en banc*). Where the CO requests documents or information with a direct bearing on the resolution

[2] Violation of any OSHA standards for temporary labor camps under this section are not at issue in this decision and will not be examined. It suffices here to note that OSHA requires conformity to habitable living conditions and environmental codes.
[3] "RA" refers to "regional administrator" who serves the same function as a CO. *See* 20 C.F.R 655.101 (c) (1).

of an issue and which is obtainable by reasonable effort, the employer must provide it. *Gencorp,* 1987-INA-659 (January 13, 1988) (*en banc*).

Here, Employer must meet its burden to show that it has documented to the satisfaction of the CO that the housing complies with the local, State or federal housing standards applicable under 20 C.F.R. §655(b)(1)(iii). Employer has failed to meet this burden because it has been unable to provide adequate documentation for its housing units at every stage of this proceeding sufficient to house the 250 aliens referred to in Employer's H-2A Application. Employer was unable to fulfill the CO's first request for modification regarding its housing deficiencies on April 20, 2005. Employer also failed to satisfy the CO's second modification request on April 29, 2005. Instead of submitting a response to the CO's April 29 Modification Request, Employer filed an appeal to the Office of Administrative Law Judges ("OALJ") whereupon this case was assigned to me.

In ALJX 1 submitted by Employer, the housing documentation is still inadequate as Employer submits inconsistent information regarding its capacity to house its workers. *See* EX 4 and EX 5. The most significant deficiency, however, is Employer's refusal to submit any documentation showing a letter of intent, lease or other form of confirmation stating its commitment to house its workers in Employer's Housing Units and in Valley Fruit Orchard's Housing Unit. Employer argues in both ALJX 1 and ALJX 3 that submitting this form of documentation is unnecessary as these units are owned by Employer, and Valley Fruit, respectively. Employer later lists the available occupancy in these units but still maintains that no documentation is needed. *See* ALJX 3 at 3. This argument has no merit as it falls within the regulatory powers of the CO to require this kind of basic documentation. Unless Employer can meet its burden of proof and show that employer-owned housing is exempt from the requirement of providing a lease or other confirmatory document under local, State or federal housing

standards, I find that neither Employer's Housing Units or the Valley Fruit Unit are exempt from this requirement. Alternatively, assuming that Employer has reconciled some of the inconsistent numbers by providing additional documentation pertaining to the eight housing units in ALJX 3, the additional exhibits are not admissible as noted above. This documentation should have been provided to the CO's April 29 Modification Request and not presented on appeal to the OALJ for my review.

In response to Respondent's argument that employer has failed to demonstrate that it has enough housing for its workers, an examination of the record reveals that Employer can house between 134 to 158 workers out of the total 250 workers requested. Respondent argues that Employer has only confirmed housing for 134 workers, the number noted on Employer's chart for the 4 Units owned by UBPM because it has not provided any information regarding occupancy for the remaining 4 units at the time Employer filed this appeal. ALJX 2 at 3. Upon my re-examination of the record after Employer has filed ALJX 1, the record can confirm an additional 24 workers at the housing unit owned by Quail Ridge Apartments. *See* EX 5, Letter of intent from Quail. Respondent also acknowledges that this letter of intent indicates a contract for 24 occupants, but points out the reduction from 76 workers as noted on the original application. ALJX 2 at 3. *See also* EX 5, Washington State Department of Health Temporary Housing License noting occupancy of 76. I therefore find that Employer has shown that it could house up to 158 workers (134 from UBPM and 24 from Quail Ridge Apartments), but fails to meet the required housing occupancy for the 250 workers requested in its H-2A Application.

As for Respondent's argument that Employer has not guaranteed that workers will remain in approved housing, I find that Employer has not provided a timely indication that it would amend its provision stating that "housing assignments may be changed during the season" to one

stating that housing assignments will only be changed to already certified housing for Valley Fruit and Green Acre Farm. *See* ALJX 1 at 3, n.4 (Employer states that it will amend this language if the CO insists).

Employer Is Judicially Estopped From Asserting That This H-2A Application Seeks An Additional 90 Workers From Its Previous H-2A Application For 90 Workers At Valley Fruit Orchard And Green Acre Farm (OALJ Case No. 2005-TLC-00009).

I take administrative notice of the file in an earlier case before me involving these same parties – OALJ Case No. 2005-TLC-00009. There, the application for 90 workers for Valley Fruit Orchards was assigned case number 2005-TLC-00009 and a decision was issued by me on June 1, 2005 reversing the CO's denial of 29 H-2A certifications. In that case, Employer was only seeking H-2A certifications for 29 out of the 90 workers requested on its application. Employer presented an argument in 2005-TLC-00009 that their subsequent application dated April 12, 2005 for the 90 workers, the instant H-2A Application in this case, was meant to "replace and perfect" a prior H-2A application for Green Acre Farm and Zirkle Farm which they had submitted on November 24, 2004 and which was denied certification on January 3, 2005.

Given Employer's winning argument in the prior case no. 2005-TLC-00009, I find additional grounds to affirm the CO's determination in this case because I find that Employer is judicially estopped from re-characterizing the purpose of its April 12, 2005 filing of the H-2A Application. Because Employer describes the purpose of its April 12, 2005 H-2A Application as it "replaces and perfects" the Green/Zirkle Application, an application previously denied certification on January 3, 2005, I find that Employer has not timely resubmitted its request for

an amended application nor has Employer timely requested review of the January 3, 2005 denial. See 20 C.F.R. §§ 655.100(c)(2) and 655.204(d)(2).

ORDER

For the reasons stated above, the CO's determination in this case is **AFFIRMED**.

A

Gerald M. Etchingham
Administrative Law Judge

San Francisco, California